

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BITUMINOUS CASUALTY
CORPORATION, an Illinois Insurance
Company,

Plaintiff,

vs.

SAND LIVESTOCK SYSTEMS, INC.,
a Nebraska corporation; SAND SYSTEMS,
INC., a Nebraska corporation; FURNAS
COUNTY FARMS, a Nebraska general
partnership; and CORI A. GOSSAGE,
Individually, and as Administrator of the
Estate of Raymond Charles Gossage, Jr.,
and as Next Friend and Mother of
Brian M. Gossage;

Defendants.

No. C04-4028-PAZ

MEMORANDUM OPINION
AND ORDER ON PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

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I. INTRODUCTION

This action concerns the language of two insurance policies – a commercial lines policy and an umbrella policy (“the policies” or “the insurance policies”) – issued by the plaintiff Bituminous Casualty Corporation (“Bituminous”) to the defendant Sand Livestock Systems, Inc. (“Sand Livestock”). The defendant Cori A. Gossage, individually and as administrator of the estate of her deceased husband Raymond Charles Gossage, Jr. (“Raymond Gossage”), and as next friend and mother of her minor child Brian M. Gossage (“Brian Gossage”), filed a wrongful death action in Ida County, Iowa, District Court against Sand Livestock and Sand Systems, Inc. (“Sand Systems”), seeking damages arising from the death of Raymond Gossage. On April 19, 2004, Bituminous filed a Complaint in this court seeking a declaration that it has no duty under the policies to pay damages to Mrs. Gossage, or to defend or indemnify Sand Livestock, Sand Systems, or Furnas County Farms (“Furnas”), for claims or damages arising out of the death of Raymond Gossage. On May 5, 2004, Mrs. Gossage filed an Answer to the Complaint, asking the court to declare that Bituminous has a duty to defend and indemnify Sand Livestock under both insurance policies. On June 21, 2004, Sand Livestock and Sand Systems filed an Answer, also asking the court to declare that Bituminous has a duty to defend and indemnify Sand Livestock under both insurance policies.¹ The parties consented to jurisdiction by a United States magistrate judge, and on August 24, 2004, the district court filed an order transferring case to the undersigned.

¹There is no indication in the record that Furnas appeared in this case until it joined in a motion for extension of time filed by Sand Livestock and Sand Systems on April 27, 2004. (See Doc. No. 20) Also, it is unclear from the documents filed in the case whether any of the defendants resist the motion for summary judgment with respect to Sand Systems or Furnas. The court **GRANTS** the motion for summary judgment with respect to Sand Systems and Furnas.

On April 11, 2005, the plaintiff Bituminous filed a motion for summary judgment, a statement of material facts, a supporting brief, and an appendix. (Doc. No. 15) On April 21, 2005, Mrs. Gossage filed a resistance to the motion. (Doc. No. 17) On May 26, 2005, Bituminous filed a supplement to its brief in support of the motion (Doc. No. 25), and Mrs. Gossage filed a brief in resistance to the motion and a response to Bituminous's statement of material facts. (Doc. Nos. 28 & 26, respectively) On May 27, 2005, Sand Livestock, Sand Systems, and Furnas jointly filed a resistance to the motion for summary judgment, with a supporting affidavit and brief, and a statement of material facts. (Doc. No. 29) On June 3, 2005, Bituminous filed a response to the statement of material facts filed by Sand Livestock, Sand Systems, and Furnas (Doc. No. 31), and a reply brief (Doc. No. 33).

Bituminous requested oral argument on the motion. The request for oral argument was granted, and the court heard arguments on June 17, 2005. Timothy W. Hamann and Jared R. Knapp appeared for Bituminous; Donald H. Molstad appeared for Sand Livestock, Sand Systems, and Furnas; and Robert Allen Burnett, Jr. appeared for Mrs. Gossage.

The court has considered the parties' submissions and arguments carefully, and turns now to discussion of the issues raised by Bituminous in its motion.

II. UNDISPUTED FACTS

The central facts in this case are not in dispute. Sand Livestock constructed a hog confinement facility in Ida County, Iowa, for Furnas. During the construction of the facility, Sand Livestock installed a propane power washer in a washroom in the building. On November 27, 2002, Raymond Gossage, an employee of Furnas, was working at the facility. While using the toilet in the washroom, he was overcome by carbon monoxide

fumes produced by the propane power washer and died from asphyxiation. Furnas later was cited by the Iowa Occupational Safety and Health Administration for having a propane device in a room without an outside air supply, creating a risk of carbon monoxide fume buildup. Furnas paid a fine as a result of the citation.

Bituminous is the issuer of two insurance policies listing Sand Livestock Systems, Inc. as the named insured. The first, entitled "Commercial Lines Policy," was effective from January 1, 2002, to January 1, 2003. The second, entitled "Commercial Umbrella Policy," also was effective from January 1, 2002, to January 1, 2003. The Commercial Lines Policy contains an Endorsement entitled "Total Pollution Exclusion with a Hostile Fire Exception," which provides as follows:

This insurance does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

"Pollutants" are defined in the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The Commercial Umbrella Policy contains an endorsement entitled "Pollution Exclusion" which provides as follows:

It is agreed that this policy does not apply:

- A. to any liability for "bodily injury," "property damage" or "personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of "pollutants at any time."

* * *

- C. to any obligation of the “insured” to indemnify or contribute to any party because of “bodily injury,” “property damage” or “personal and advertising injury” arising out of the actual, alleged or threatened discharge, dispersal, release or escape of “pollutants.”
- D. to any obligation to defend any “suit” or “claim” against any “insured” alleging “bodily injury,” “property damage” or “personal and advertising injury” and seeking damages for “bodily injury,” “property damage” or “personal and advertising injury” arising out of the actual, alleged or threatened discharge, dispersal, release or escape of “pollutants.”

* * *

“Pollutants” means any solid, liquid, gaseous, or thermal irritants or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. . . .

III. STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment, and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. See Fed. R. Civ. P. 56(a), (b). Rule 56 further states that summary judgment:

shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). “A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [the nonmoving party] the benefit of all reasonable inferences that can be drawn from the

facts.” *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 (N.D. Iowa 1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

The Eighth Circuit follows the principle that “summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Id.* (quoting *Celotex*, 477 U.S. at 327). *See also Hartnagel v. Norman*, 953 F.2d at 396.

If Bituminous shows no genuine issue exists for trial, and if the defendants cannot advance sufficient evidence to refute that showing, then Bituminous is entitled to judgment as a matter of law, and the court must grant summary judgment in Bituminous’s favor. If, on the other hand, the court “can conclude that a reasonable trier of fact could return a verdict for [the defendants], then summary judgment should not be granted.” *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510)

IV. ANALYSIS

A. Choice of Law

Before the court can determine whether there is coverage under the policies, the court first must decide which state’s law should be applied in making this determination. Because this is a diversity action brought in Iowa, any “choice of law” determination must be made in accordance with Iowa law.

A federal court sitting in diversity must apply the choice of law rules of the forum state – in this case, Iowa. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Iowa law, in turn, employs the Second Restatement’s “most significant relationship” test to

determine which state's law will govern a contract's interpretation. See, e.g., *Veasley v. CRST Internat'l, Inc.*, 553 N.W.2d 896, 897 (Iowa 1996) (recognizing Iowa's adoption of the "most significant relationship" test).

State Auto Mut. Ins. Co. v. Dover Const., Inc., 273 F. Supp. 2d 1023, 1026 (N.D. Iowa 2003); see *Ferrell v. West Bend Mut. Ins. Co.*, 393 F.3d 786, 794 (8th Cir. 2005) ("As federal jurisdiction in this case is premised on diversity of citizenship, we look to the choice-of-law rules of the forum State to determine which law applies.") Therefore, the court must use the "most significant relationship" test, as applied by Iowa courts, to decide which state's law governs the interpretation of the policies.

The facts relevant to the choice-of-law issue are as follows. The insurance policies were issued by Bituminous, an Illinois corporation with its principle place of business in Illinois. Bituminous is qualified and licensed to underwrite insurance in Iowa. Sand Livestock, the named insured under the policies, is a Nebraska corporation with its principal place of business in Nebraska, but is authorized to conduct business in Iowa. The Gossages at all material times lived in Crawford County, Iowa, and the Raymond Gossage estate is open in Crawford County. The hog confinement facility where the accident occurred is in Ida County, Iowa, where it was constructed by Sand Livestock for Furnas. Furnas is a Nebraska partnership with its principal place of business in Nebraska, but is authorized to conduct business in Iowa. Sand Systems is a Nebraska corporation with its principal place of business in Nebraska, but also is authorized to conduct business in Iowa. The insurance policies list ten locations on the schedule of premises locations, seven in Nebraska, one in Illinois, one in Kansas, and one in Iowa.

The leading Iowa case on the application of the "most significant relationship" test to choice-of-law questions in insurance policy cases is *Gabe's Construction Co., Inc. v.*

United Capitol Insurance Co., 539 N.W.2d 144 (Iowa 1995) In *Gabe's Construction*, the court held as follows:

We determine choice-of-law issues in insurance policy cases by the intent of the parties or the most significant relationship test. *Cole v. State Auto. & Casualty Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980). In the absence of a choice-of-law clause in the policy, the rights of the parties are determined by the law of the state which "has the most significant relationship to the transaction and the parties." Restatement (Second) of Conflict of Laws § 188(1) (1971). The contacts to be taken into account include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 188(2).

* * *

We conclude Iowa has the most significant relationship to the transaction and the parties. The Restatement provides additional guidance for contracts of fire, surety or casualty insurance:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect

to the particular issue, some other state has a more significant relationship. . . .
Restatement (Second) of Conflict of Laws § 193 (1971).
Liability insurance is one of the various kinds of casualty insurance. *Id.* cmt. a.

Gabe's Construction, 539 N.W.2d at 146-47.

The insurance policies in question have no choice-of-law clause, so the court must use the “most significant relationship” test to determine which state’s law should be used to interpret the policies. Bituminous presumably issued both policies to Sand Livestock in Nebraska; however, the record is silent on where the policies were negotiated.² Both the places of performance of the policies and the locations of the subject matter of the policies included Nebraska, Iowa, Kansas, and Illinois. The parties resided in Nebraska, Illinois, and Iowa.

In evaluating these “contacts” in accordance with their relative importance, none appears to be of overwhelming significance. The fact that the policies were issued to Sand Livestock in Nebraska is a product of the fact that Sand Livestock is a Nebraska corporation with its principal place of business in Nebraska, and does not necessarily implicate a significant interest of the state of Nebraska in the scope of the coverage provided by the policies, particularly for an incident that occurred in Iowa. In fact, by their very terms, the policies were intended to cover Sand Livestock’s activities and properties in states other than Nebraska where Sand Livestock was authorized to conduct business, including Iowa, Illinois, and Kansas. Nebraska certainly would have an interest in whether Sand Livestock was covered, or was not covered, by its liability insurance policies. However, Iowa would have an equally great interest in whether Sand Livestock

²According to the commercial lines policy, Bituminous has branch offices in Iowa, Illinois, and Kansas, but not in Nebraska.

had liability insurance coverage for its activities in Iowa that might affect Iowa citizens. With respect to an insurance company incorporated and principally officed in Illinois, Illinois would have an interest in the scope of coverage, and the exclusions from coverage, under insurance policies issued by the company. Any such interest would be offset, however, by the fact that Bituminous, by selling insurance in various other states, knows it is subjecting itself to the laws and regulations of those states.³ Except for the fact that Raymond Gossage was working for a Nebraska corporation at the time of his death, nothing in the record suggests the Gossages had contact with any state other than Iowa.

In sum, this analysis is not particularly helpful, although, on balance, it would seem Iowa would have the most significant relationship to the parties and issues in this case. Regardless, the question is resolved by application of the analysis reflected in comment f to section 193 of the Restatement (Second) of Conflicts of Laws, which provides as follows:

A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved three policies, each insuring an individual risk. So, if the house located in state X were damaged by fire, it is thought that the court would determine the rights and

³In fact, the policies in question here contain numerous endorsements to address the legal requirements of various states, including the four states where Sand Livestock does business.

obligations of the parties under the policy, at least with respect to most issues, in accordance with the local law of X.

To apply this reasoning to the risks insured by Bituminous in the present case, each of the insurance policies should be treated as four separate policies, with separate commercial lines policies for Iowa, Nebraska, Kansas, and Illinois, and separate umbrella policies for Iowa, Nebraska, Kansas, and Illinois. The parties' rights and obligations with respect to insurance coverage for claims arising out of the death of Raymond Gossage, which occurred in an insured property in Iowa, should be determined under Iowa law. *See, e.g., Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1120 (11th Cir. 1990) ("[A]lthough the risks covered under the Associated umbrella policy were spread out over several states, the Restatement advises application of the substantive law of the state in which each individual risk is located when adjudicating issues concerning that risk, treating the comprehensive policy effectively as several different policies. Since the case with which we are concerned arose out of an accident which occurred . . . in Florida, one of the insured premises under the Associated policy, the Restatement would have us apply Florida substantive law.")

Although the Restatement is not the law of Iowa, the Iowa Supreme Court repeatedly and consistently has demonstrated a commitment to the Restatement in analyzing choice-of-law issues. *See Washburn v. Soper*, 319 F.3d 338, 342 (8th Cir. 2003). Accordingly, the court will construe the policies under Iowa law.⁴

B. The Pollution Exclusions

This case concerns the construction of the pollution exclusions in the commercial lines and the umbrella policies issued by Bituminous to Sand Livestock. Bituminous

⁴Bituminous does not seriously contest this conclusion. (See Doc. No. 15-3, pp. 7-8)

argues these exclusions relieve it from any duty to defend or indemnify Sand Livestock for the claims of the Gossages. The defendants argue the exclusions do not apply to the particular facts of this case, and Bituminous is obligated to defend Sand Livestock and to cover any losses that may arise if Sand Livestock is found to be liable to the Gossages.

The Iowa Supreme Court has never construed the meaning or scope of a pollution exclusion in an insurance policy in this particular context. The United States Supreme Court has held, “When [the highest court of a state] has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.” *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236, 61 S. Ct. 179, 183, 85 L. Ed. 139 (1940). Because the Iowa Supreme Court has not interpreted the pollution exclusion, this court must “predict” how the Iowa Supreme Court would interpret the exclusion. See *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 420 (8th Cir. 2005) (citing *Ehlis v. Shire Richwood, Inc.*, 367 F.3d 1013, 1016 (8th Cir. 2004)).

For many years, courts throughout the United State have interpreted pollution exclusions such as those contained in the policies at issue, and have reached a dizzying array of results. In the recent case of *Quadrant Corp. v. American States Insurance*, 110 P.3d 733 (Wash. 2005), the Washington Supreme Court gave a brief history of how the law in this area has developed:

Pollution exclusions originated from insurers’ efforts to avoid sweeping liability for long-term release of hazardous waste. *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 795 N.E.2d 15, 18, 763 N.Y.S.2d 790 (2003). Originally, the standard pollution exclusion that was incorporated into commercial general liability policies was a “‘qualified’” exclusion that precluded coverage unless the release of pollutants was “‘sudden and accidental.’” *Id.* 763 N.Y.S.2d

790, 795 N.E.2d at 18-19. The qualified pollution exclusion was limited to release or discharge of pollutants “‘into or upon land, the atmosphere or any water course or body of water.’” *Id.* 763 N.Y.S.2d 790, 795 N.E.2d at 18.

After much litigation surrounding the meaning of “sudden and accidental,” a new standard pollution exclusion was promulgated in the mid-1980s. *Id.* 763 N.Y.S.2d 790, 795 N.E.2d at 19. This time, the pollution exclusion was absolute; it no longer contained the “sudden and accidental” exception. *Id.* Moreover, most absolute pollution exclusions omitted the language referring to release upon the land, atmosphere, or water. *Id.* The exclusions at issue in this case are absolute pollution exclusions.

The rise of absolute pollution exclusions sparked new controversy over whether the exclusion applied to incidents that did not involve so-called classic environmental pollution. *Id.* Many courts have interpreted absolute pollution exclusions specifically in the context of claims for bodily injuries arising out of the release of toxic fumes. Some have concluded that the absolute pollution exclusion does not apply where personal injury has resulted from the negligent release of fumes during the ordinary course of the insured’s business. *See, e.g., Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 29-31 (1st Cir. 1999); *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72, 82, 227 Ill. Dec. 149 (1997) (“[T]he exclusion applies only to those injuries caused by traditional environmental pollution.”). These courts have relied on several different theories. Some have concluded that the terms “discharge,” “dispersal,” “irritant,” and “contaminant” are terms of art in environmental law, thus rendering the exclusion ambiguous. *See Belt Painting*, 763 N.Y.S.2d 790, 795 N.E.2d at 19 (citing *Nautilus Ins. Co.*, 188 F.3d at 30). Others have concluded that because the historical purpose of the prior qualified pollution exclusion was to shield insurers from sweeping liability for environmental cleanups, the absolute pollution exclusion clause could be reasonably interpreted to apply only to traditional environmental harms. *See id.*;

Koloms, 227 Ill. Dec. 149, 687 N.E.2d at 81. Finally, some courts have concluded that a “commonsense approach” is necessary and the pollution exclusion should not be read to apply to “injuries resulting from everyday activities gone slightly, but not surprisingly, awry.” *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043-44 (7th Cir. 1992).

However, a majority of courts has concluded that absolute pollution exclusions unambiguously exclude coverage for damages caused by the release of toxic fumes. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112, 118 (2001) (listing cases); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1137 n.2 (Fla. 1998) (noting that insurers and amici cited to more than 100 cases from 36 other states that had applied the plain language of the exclusion clause to deny coverage). See, e.g., *Nat’l Elec. Mfrs. Ass’n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821, 825-26 (4th Cir. 1998); *Technical Coating Applicators, Inc. v. U.S. Fid. & Guar. Co.*, 157 F.3d 843, 846 (11th Cir. 1998) (holding similar language unambiguously excluded coverage for bodily injuries sustained by breathing vapors emitted from roofing products); *Owners Ins. Co. v. Farmer*, 173 F. Supp. 2d 1330, 1333-34 (N.D. Ga. 2001) (“the unambiguous language of the policy excludes all pollutants and does not exclude pollutants based on their source or location”); *Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 2002 Ok 34, 55 P.3d 1030, 1035 (holding similar language excluded coverage for property damage or bodily injury regardless of whether there was damage to the general environment); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521-22 (Tex. 1995).

Quadrant Corp., 110 P.3d at 737-38.

The court in *MacKinnon v. Truck Insurance Exchange*, 73 P.3d 1205 (Cal. 2003), also gave the pollution exclusion a narrow meaning, under California law, holding as follows:

To say there is a lack of unanimity as to how the clause should be interpreted is an understatement. Although the fragmentation of opinion defies strict categorization, courts are roughly divided into two camps. One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business. These courts generally find ambiguity in the wording of the pollution exclusion when it is applied to such negligence and interpret such ambiguity against the insurance company in favor of coverage. The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution, and that the clause is as unambiguous in excluding the former as the latter.

MacKinnon, 73 P.3d at 1209. The court also observed “[c]onsidering those jurisdictions that have taken a definitive position, as represented by a published opinion of the state supreme court, the narrower interpretation of the pollution exclusion appears to be in the majority.” *Id.* n.2 (listing cases). *But see, e.g., Regional Bank of Colorado v. St. Paul Fire & Marine Ins. Co.* 35 F.3d 494 (10th Cir. 1994) (holding carbon monoxide from residential heater not excluded, applying Colorado law to determine “reasonable expectations of ordinary policyholder”).⁵

⁵In *Regional Bank of Colorado*, the court considered whether carbon monoxide fumes from a residential heater should be “pollution” for purposes of policy exclusion, holding as follows:

A reasonable policy holder would not understand the policy to exclude coverage for anything that irritates. ‘Irritant’ is not to be read literally and in isolation, but must be construed in the context of how it is used in the policy, i.e., defining ‘pollutant.’ While a reasonable person of ordinary

(continued...)

Iowa is not among those states that have addressed the scope of standard “absolute” or “total” pollution exclusions such as those at issue in the present case. However, in *Weber v. IMT Insurance Co.*, 462 N.W.2d 283 (Iowa 1990), the Iowa Supreme Court addressed several questions concerning the earlier version of the pollution exclusion. In that case, Weber had spilled hog manure on a road that allegedly contaminated a neighbor’s sweet corn crop. Weber sought coverage under his Farmer’s Comprehensive Personal Liability Policy and a Personal Umbrella Policy, both of which contained a pollution exclusion covering, *inter alia*, “waste material.” The term “waste material” was not defined in the policy, but the court, giving the term its ordinary meaning, found the term would encompass hog manure that had been spilled on the road. The court went on to make the following observations:

We are, however, inclined to limit our holding to the facts of this case. Courts are currently struggling in an attempt to define the limitations imposed by pollution exclusions identical to the exclusion in this case. Amici in support of IMT has urged us to follow the rationale used in *Guilford Industries, Inc. v. Liberty Mut. Ins. Co.*, 688 F. Supp. 792 (D. Me.1988). The court, in *Guilford*, held that oil spilled from storage tanks constitutes a pollutant. *Id.* at 794. The court reasoned that once oil escapes into the environment, it no longer maintains its beneficial purpose; it becomes a pollutant. *Id.* Amici urges us to extend this logic to all instances where bodily injury or property damage

⁵(...continued)

intelligence might well understand carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as ‘pollution.’ It seems far more reasonable that a policyholder would understand it as being limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable.

Id., 35 F.3d at 498.

results from the discharge, dispersal, release or escape of anything, since anything that escapes into the environment and causes bodily injury or property damage is a pollutant.

We strive to give effect to all of the language of a contract. *Berryhill v. Hatt*, 428 N.W.2d 647, 654 (Iowa 1988). “[A]n interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect.” *Id.* at 655 (citing *Fashion Fabrics v. Retail Investors*, 266 N.W.2d 22, 26 (Iowa 1978)).

We recognize that following the line of reasoning suggested by amici would essentially eliminate any meaning for the terms “smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants.” These terms would lack any meaning because anything that escapes into the environment causing bodily injury or property damage would be classified as a pollutant under this approach. Therefore, if we were to adopt this interpretation we would, in essence, be left with a pollution exclusion that eliminates coverage for “bodily injury or property damage arising out of the discharge, dispersal, release or escape [of any substance].” To construe the policy language in this manner violates our principle that contracts should be interpreted to give all terms meaning. Therefore, we are not willing to adopt the approach suggested by amici.

Weber, 462 N.W.2d at 286.

The defendants argue this reasoning strongly suggests the Iowa Supreme Court would adopt the approach of the courts that have found the pollution exclusion should be construed as ambiguous when applied to situations involving other than traditional environmental pollution. *See, e.g., Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997) (involving the inhalation of carbon monoxide from a defective furnace); *see also Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 930 (2005) (“We conclude

that the pollution exclusion provision applies to traditional environmental pollution claims”); *Auto-Owners Ins. Co. v. Potter*, 105 Fed. Appx. 484, 2004 WL 1662454 (4th Cir. 2004) (applying North Carolina law to hold the exclusion applies only to discharges into the environment); *see also Allstate Ins. Co. v. Barron*, 848 A.2d 1165, 1181 n.19 (Conn. 2004) (citing carbon monoxide cases). In other carbon monoxide cases, the Supreme Courts of Massachusetts and Ohio have concluded the pollution clause would not bar coverage. *See W. Alliance Ins. Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997); *Andersen v. Highland House Co.*, 757 N.E.2d 329 (Ohio 2001). In *Nav-Its, Inc.*, the court pointed out that “[t]he decisions of the highest courts in California, Illinois, Massachusetts, Ohio, New York and Washington are consistent with our decision to limit the pollution exclusion to those hazards traditionally associated with environmentally related claims.” *Nav-Its, Inc.*, 869 A.2d at 938. *See, e.g., Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 18 (N.Y. 2003) (finding standard total pollution exclusion ambiguous under New York law); *Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051, 1066 (Wyo. 2002) (“We do not know if it is the majority position, but we will join with those courts that have held the total pollution exclusion to be limited to the concept of environmental pollution”).

Bituminous argues the principles of construction for insurance contracts in Iowa support the application of the total pollution exclusion in this case. These principles were summarized as follows by the Iowa Supreme Court in *Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Federated Mutual Insurance Co.*, 596 N.W.2d 546 (Iowa 1999) (“*Underground Storage Tank*”):

The issues on the Board's appeal require us to interpret and construe provisions of the pollution liability policy issued to CML by Federated. Our rules of contract interpretation peculiar to insurance policies apply. *See [LeMars Mut. Ins.*

Co. v. Joffer, 574 N.W.2d 303, 306 (Iowa 1998)] (citing *Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296, 298 (Iowa 1994)).

Interpretation and construction “are technically distinct exercises with regard to resolving insurance contract problems.” Interpretation requires a court to determine the meaning of contractual words. This is a question of law for the court unless the meaning of the language depends on extrinsic evidence or a choice among reasonable inferences to be drawn. Construction of an insurance policy requires the court to determine its legal effect. The proper construction of an insurance contract is always an issue of law for the court.

The cardinal principle in the construction and interpretation of insurance policies is that the intent of the parties at the time the policy was sold must control. Except in cases of ambiguity, the intent of the parties is determined by the language of the policy. “An ambiguity exists if, after the application of pertinent rules of interpretation to the policy, a genuine uncertainty results as to which one of two or more meanings is the proper one.” Because of the adhesive nature of insurance policies, their provisions are construed in the light most favorable to the insured. Exclusions from coverage are construed strictly against the insurer.

Id. at 306-07 (citations omitted) (quoting *Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296, 299 (Iowa 1994) and *A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 618 (Iowa 1991)).

* * *

The Board alternatively argues that the application of exclusion (a) is contrary to CML's reasonable expectations of

coverage. We have previously explained that an insured can utilize the doctrine of reasonable expectations to avoid an exclusion that “(1) is bizarre or oppressive, (2) eviscerates a term to which the parties have explicitly agreed, or (3) eliminates the dominant purpose of the policy.” *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (citing *Clark-Peterson Co. v. Independent Ins. Assocs., Ltd.*, 492 N.W.2d 675, 677 (Iowa 1992)). However, as a prerequisite to the applicability of this doctrine, the insured must show “circumstances attributable to the insurer that fostered coverage expectations” or that “the policy is such that an ordinary layperson would misunderstand its coverage.” *Id.* at 357.

We find that the Board has failed to establish one of the prerequisites necessary for the applicability of this doctrine. First, there are no circumstances attributable to Federated that fostered coverage expectations. The Board does not assert, and we find no record of, any representations by Federated that would have led CML to believe coverage would be available under the scenario presented in the case at bar. The Board maintains that its payment of the \$13,120 premium is indicative of CML's reasonable belief that the environmental damage at issue would be covered. We do not believe, however, that the simple act of paying the premium requested by an insurance company is sufficient to establish “circumstances attributable to the insurer that fostered coverage expectations.” *Id.* Second, the language of the exclusion is not “such that an ordinary layperson would misunderstand its coverage.” *Id.* The exclusion is succinct and clearly written and simple enough for a layperson to comprehend.

Underground Storage Tank, 596 N.W.2d at 550, 551.

Iowa follows the general rule of contract interpretation that “when a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling.” *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d

859, 863 (Iowa 1991) (citations omitted). An insurance policy is a contract that is subject to the general rules of contract analysis. See *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 590 (Iowa 1990). Undefined contract terms are given their ordinary meanings, as they would be understood by a reasonable person rather than by a specialist or expert. If words are susceptible to two interpretations, Iowa adopts the interpretation favorable to the insured. *A.Y. McDonald Indus., Inc. v. Ins. Co. of North Am.*, 475 N.W.2d 607, 619 (Iowa 1991) (citations omitted).

The Iowa Supreme court has explained the court's task in considering disputes over insurance contracts, as follows:

When construing or interpreting the meaning of insurance policy provisions we strive to ascertain the intent of the parties at the time the policy was sold. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988); *State Auto. & Casualty Underwriters ex rel. Auto. Underwriters v. Hartford Accident & Indem. Co.*, 166 N.W.2d 761, 763 (Iowa 1969).

"Interpretation" and "construction" are technically distinct exercises with regard to resolving insurance contract problems. *Connie's Constr. Co. v. Fireman's Fund Ins. Co.*, 227 N.W.2d 207, 210 (Iowa 1975). "Interpretation" calls for this court to determine the meaning of contractual words. *Id.* These questions are legal in nature unless the meaning of the language "depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence." *Id.* Construing a contract, on the other hand, calls for this court to determine the legal effect of a contract. *Id.* The proper construction of an insurance contract is always an issue of law for the court to resolve. *Id.*

Insurance contracts are construed in the light most favorable to the insured. *Id.* Exclusion provisions in insurance policies are construed strictly against the insurer. *Bankers Life Co. v. Aetna Casualty & Sur. Co.*, 366 N.W.2d

166, 169 (Iowa 1985). When construing insurance policies “[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.” *Grinnell*, 431 N.W.2d at 786 (quoting *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973)). The principle of reasonable expectations “undergirds the congeries of rules applicable to construction of insurance contracts in Iowa.” *Rodman*, 208 N.W.2d at 906.

When construing insurance policies we consider the effect of the policy as a whole, in light of all declarations, riders, or endorsements attached. *Bankers Life*, 366 N.W.2d at 168-69; *Stover v. State Farm Mut. Ins. Co.*, 189 N.W.2d 588, 591 (Iowa 1971); *Hartford Accident*, 166 N.W.2d at 764.

Ferguson v. Allied Mutual Ins. Co., 512 N.W.2d 296, 299 (Iowa 1994).

Bituminous argues the above-discussed Iowa case law supports its interpretation of the insurance policies in this case, and the Iowa Supreme Court would interpret the exclusion to deny coverage for Raymond Gossage’s death. Numerous courts have agreed with the position taken by Bituminous in this case. *See, e.g., United States Fidelity & Guaranty Co. v. Lehigh Valley Ice Arena, Inc.*, 121 Fed. Appx. 979, 2005 WL 388659 (3rd Cir. 2005) (applying Pennsylvania law to exclude claims based on inhalation of carbon monoxide from a malfunctioning Zamboni machine); *Ferrell v. State Farm Insurance Co.*, No. A-01-637, 2003 WL 21058165 at *3 (Neb. Ct. App., May 13, 2003) (“[A] majority of state and federal jurisdictions has held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for all claims alleging damage caused by pollutants”) (citing cases). *See also Nationwide Mut. Ins. Co. v. Nat’l REO Mgmt., Inc.*, 205 F.R.D. 1, 3 (D.D.C. 2000) (under District of Columbia law, pollution exclusion clause barred coverage for personal injuries from release of carbon

monoxide); *Admiral Ins. Co. v. Feit Mgmt. Co.*, 321 F.3d 1326 (11th Cir. 2003) (same, applying Florida law); *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997 (4th Cir. 1998) (same, applying Missouri law).

As the above discussion amply illustrates, both parties' positions are supported by case law from other jurisdictions, and there is no Iowa case either directly on point or sufficiently definitive to allow this court to predict how the Iowa Supreme Court would decide the issue presented here. As a result, the court now will consider certification of the issue.

C. Certification of Question to Iowa Supreme Court

How the Iowa Supreme Court would decide the issue of coverage for the Gossages' damages under the pollution exclusions in the insurance policies is unclear. Therefore, the court has carefully considered whether to certify the issue raised by these facts to the Iowa Supreme Court. "Whether a federal district court should certify a question of state law to the state's highest court is a matter 'committed to the discretion of the district court.'" *Leiberknecht v. Bridgestone/Firestone, Inc.*, 980 F. Supp. 300, 309 (N.D. Iowa 1997) (quoting *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881-82 (8th Cir. 1996) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 1744, 40 L. Ed. 2d 215 (1974)); and citing *Packett v. Stenberg*, 969 F.2d 721, 726 (8th Cir. 1992) (also citing *Lehman Bros.*)).

This court's Local Rules provide:

When a question of state law may be determinative of a cause pending in this court and it appears there may be no controlling precedent in the decisions of the appellate courts of the state, any party may file a motion to certify the question to the highest appellate court of the state. The court may, on

such motion or on its own motion, certify the question to the appropriate state court.

LR 83.1 (as amended Jan. 1, 2003). The Iowa Supreme Court is authorized by statute to answer questions certified by this court where the questions “may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of [Iowa].” Iowa Code § 684A.1 (1996).

In *Leiberknecht*, the Honorable Mark W. Bennett discussed in some detail the following factors to be considered in determining whether to certify a question to a state’s highest court:

(1) the extent to which the legal issue under consideration has been left unsettled by the state courts; (2) the availability of legal resources which would aid the court in coming to a conclusion on the legal issue; (3) the court's familiarity with the pertinent state law; (4) the time demands on the court’s docket and the docket of the state supreme court; (5) the frequency that the legal issue in question is likely to recur; and (6) the age of the current litigation and the possible prejudice to the litigants which may result from certification. *Olympus Alum. Prod. v. Kehm Enters., Ltd.*, 930 F. Supp. 1295, 1309 n.10 (N.D. Iowa 1996) (citing *Rowson v. Kawasaki Heavy Indus., Ltd.*, 866 F. Supp. 1221, 1225 & n.5 (N.D. Iowa 1994)).

Leiberknecht, 980 F. Supp. at 310. The court added a seventh factor, to-wit: “whether there is any split of authority among those jurisdictions that have considered the issues presented in similar or analogous circumstances.” *Id.*, 980 F. Supp. at 311.

In the present case, the first, second and fifth factors favor certification of the issues in the present case to the Iowa Supreme Court. The legal question involved here has not been addressed directly in any decision of the Iowa Supreme Court. This issue

has arisen in most jurisdictions, and is likely to arise in Iowa in a future case. The seventh factor also favors certification. As illustrated by the preceding discussion, there is a split of authority among the jurisdictions that have considered similar issues.

The third factor is neutral. Although this court is familiar with the applicable state law, that law provides little assistance in resolving the issues at hand, although general law relating to the construction of insurance contracts will be instructive. The sixth factor also is neutral, in that the parties would not, under the resolution of the questions posed below, be forced to suffer any significant delay or inconvenience while awaiting a response from the Iowa court. The fourth factor weighs against certification. Certainly, the Iowa Supreme Court has no lesser demands on its docket than does this court.

Considering all these factors in the context of this case, the court finds certification is appropriate. See, e.g., *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789, 791-92 (Ala. 2002), in which the Alabama Supreme Court answered a question certified from federal court concerning the construction of an absolute pollution exclusion clause in an insurance contract. The answer to the issue raised here revolves around questions of state law, and given the uncertainty as to the current position of the Iowa Supreme Court on the issue, this court is reluctant to render a decision. Cf. *Keener v. Convergys Corp.*, 312 F.3d 1236, 1241 (11th Cir. 2002) (“‘Where there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* “guesses” and to offer the state court the opportunity to interpret or change existing law.’ *Mosher v. Speedstar Div. of AMCA Intern., Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995) (citation omitted).”); *Trans Coastal Roofing Co. v. David Boland, Inc.*, 309 F.3d 758, 761 (11th Cir. 2002) (same).

Accordingly, **the court hereby certifies to the Iowa Supreme Court the following question, to-wit:**

Do the total pollution exclusions in the policies issued by Bituminous to Sand Livestock relieve Bituminous from any obligation to defend or indemnify Sand Livestock, or to pay damages to Mrs. Gossage, for claims arising out of the death of Raymond Gossage?

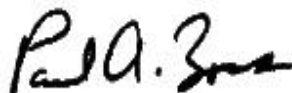
V. CONCLUSION

The court **grants** the motion for summary judgment with respect to Sand Systems and Furnas.

Based upon the foregoing analysis, the court **reserves** ruling on the plaintiff's motion for summary judgment with respect to Sand Livestock, and all further proceedings in this case are **stayed**, pending an answer from the Iowa Supreme Court to the certified question set forth above.

IT IS SO ORDERED.

DATED this 22nd day of June, 2005.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT